

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Petition of AT&T Wireless Services, Inc.)	
for Designation as an)	
Eligible Telecommunications Carrier Pursuant)	
to Section 214(e)(6) of the Communications Act,)	
FCC 97-419, in the State of Florida)	

To: Wireline Competition Bureau

COMMENTS OF TDS TELECOMMUNICATIONS CORP.

TDS Telecommunications Corp. (TDS Telecom), parent company of Quincy Telephone Company (Quincy), submits these comments in opposition to the Petition of AT&T Wireless Services, Inc. (AWS) for Designation as an Eligible Telecommunications Carrier in the State of Florida (Petition).¹ The Petition implicates a number of issues being considered by the Commission in its Notice of Proposed Rulemaking on the recently-released Recommended Decision of the Federal-State Joint Board on Universal Service (Joint Board).² TDS Telecom urges the Commission to resolve these issues before designating additional eligible telecommunications carriers (ETCs) that could exacerbate the problems and concerns identified in the Recommended Decision and Notice. Alternatively, the Commission should find that the

¹ Petition, *Federal-State Joint Board on Universal Service, Petition of AT&T Wireless Services, Inc. for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, FCC 97-419*, CC Docket No. 96-45 (filed May 3, 2004, Public Notice rel. May 21, 2004) (Petition).

² Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 04-127 (rel. June 8, 2004) (Notice); Recommended Decision, *Federal-State Joint Board on Universal Service Seeks Comment on Certain of The Commission's Rules Relating to High-Cost Universal Support and The ETC Designation Process*, CC Docket No. 96-45, FCC 04J-1 (rel. Feb. 27, 2004) (Recommended Decision).

Petition does not meet the interim public interest test set forth by the Commission in *Virginia Cellular* and *Highland Cellular*.³

I. THE COMMISSION SHOULD RESOLVE THE ISSUES PENDING IN THE RULEMAKING PROCEEDING BEFORE DESIGNATING ADDITIONAL ELIGIBLE TELECOMMUNICATIONS CARRIERS

On February 7, 2003, pursuant to the Commission's Referral Order of November 8, 2002, the Joint Board released a public notice seeking comment on the rules relating to High-Cost universal service support and the criteria and procedures for designating ETCs.⁴ The Joint Board released its Recommended Decision in February 2004. Among other proposals, the Recommended Decision supports adopting permissive federal guidelines that state commissions would be encouraged to apply – and the Commission would apply – when evaluating petitions for ETC designation. According to the Joint Board, the proposed guidelines would promote a “rigorous ETC designation process” and “should improve the long-term sustainability of the universal service fund, as only fully qualified carriers that are capable of, and committed to, providing universal service would be eligible to receive support.”⁵ The guidelines would also ensure that each designated ETC is “prepared to serve all customers within a designated service area” and is “willing to be the sole ETC should other ETCs withdraw from the market.”⁶

Although the Joint Board did not reach a consensus supporting the use of per-line support benchmarks to guide determinations concerning whether to designate additional competitive

³ Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338 (rel. Jan. 22, 2004) (“*Virginia Cellular*”); Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service, Highland Cellular, Inc Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 04-37 (rel. Apr. 12, 2004) (“*Highland Cellular*”).

⁴ *Federal-State Joint Board on Universal Service Seeks Comment on Certain of The Commission's Rules Relating to High-Cost Universal Service Support and The ETC Designation Process*, CC Docket No. 96-45, Public Notice, FCC 03J-1 (rel. Feb. 7, 2003) (*High Cost/ETC Notice*).

⁵ Recommended Decision ¶¶ 2, 9.

⁶ *Id.* ¶ 11.

ETCs (CETCs) in high-cost areas,⁷ the Joint Board expressed the view that state commissions could consider per-line support levels in determining whether to designate an additional ETC in a high-cost area and encouraged the Commission to seek further comment on establishing national per-line support benchmarks.⁸

The Commission issued the Notice seeking comment on the Recommended Decision on June 8, 2004. Among other things, the Notice specifically requests comment on the proposed ETC guidelines and on the issue of per-line support benchmarks.⁹ Interested parties may file comments in response to the Notice within 30 days after its publication in the Federal Register (which is still pending).

Shortly before release of the Recommended Decision, the Commission issued its decision in *Virginia Cellular*. In addition to designating Virginia Cellular as an ETC in certain Virginia service areas, the order set forth a “framework” for determining whether petitions for ETC designation in rural areas would serve the public interest. The Commission stated that it would apply this public interest framework to pending petitions for ETC designation in rural service areas until the Joint Board and Commission took action on the ETC designation issues referred to the Joint Board in February 2003.¹⁰ The *Virginia Cellular* framework bears some similarity to, but is not identical to, the public interest approach proposed by the Joint Board in the Recommended Decision.

⁷ Under this type of proposal, no CETCs would be designated in rural areas receiving high-cost support above a specified amount per line (such as \$30 per line or more). In addition, the number of CETCs that could be designated in other rural areas would be limited depending on the amount of per-line support received (*e.g.*, one CETC might be permitted in areas receiving more than \$20 per line in high-cost support and two CETCs might be permitted in areas receiving more than \$10 per line).

⁸ Recommended Decision ¶ 44.

⁹ Notice ¶ 2.

¹⁰ *Virginia Cellular* ¶ 4.

Although TDS Telecom acknowledges that the *Virginia Cellular* decision reflected a Commission determination at that time to proceed with evaluating petitions for ETC designation prior to resolution of the issues raised in the Recommended Decision and Notice, we urge the Commission to reconsider this course of action for a number of reasons. First, circumstances have changed since the release of *Virginia Cellular*. The Recommended Decision and Notice have been issued. The Commission is well-positioned to address the important issues concerning the ETC designation process in a comprehensive rulemaking proceeding in which all interested parties have an opportunity to participate, rather than on a piecemeal basis in connection with specific petitions for ETC designation.

Second, the public interest framework set forth in *Virginia Cellular* does not fully address all the issues involved in ETC designations. For example, *Virginia Cellular* did not address the question of how to minimize the overall impact of the growing number of CETC designations on growth of the universal service fund. Despite its “increasing concern” about the overall impact on the universal service fund of the rapid growth in high-cost support distributed to CETCs, the Commission concluded that the specific designation of Virginia Cellular in the requested service areas would not “dramatically burden” the universal service fund.¹¹ The Commission deferred the larger question for the rulemaking proceeding, expressing the “hope that the . . . pending rulemaking proceeding . . . will provide a framework for assessing the overall impact of competitive ETC designations on the universal service mechanisms.”¹² The

¹¹ *Id.* ¶ 31.

¹² *Id.* This issue is of relevance to the AWS Petition, given that AWS has sought ETC designation in other areas. See Petition, *Federal-State Joint Board on Universal Service, Petition of AT&T Wireless Services, Inc. for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, FCC 97-419*, CC Docket No. 96-45 (filed Dec. 31, 2003). The Petition indicates that AWS’s networks cover 77% of the U.S. population. Petition at 3. If AWS continues to seek ETC designation across its coverage area, the “overall impact” on the Universal Service Fund could be significant.

Commission should not continue to defer this issue while simultaneously exacerbating the problem every time it designates additional CETCs (or allows states to continue to do so without additional guidance). As Commissioner Martin recognized in his *Virginia Cellular* dissent, approving numerous CETC petitions before addressing this and other issues raised in the Recommended Decision and Notice could pre-judge the Commission's actions in the rulemaking proceeding.¹³ Continuing to grant CETC petitions now could force the Commission later to take more aggressive steps to slow the growth of the Universal Service Fund than would have been necessary if the Commission first adopted guidelines to ensure a sufficiently rigorous CETC designation process.

Virginia Cellular also did not address the question of the impact of multiple CETC designations in rural service areas where economies of scale may not support competitive entry. The Recommended Decision found that per-line support can serve as a useful marker for determining whether the line density, population density, distance between wire centers, loop lengths and levels of investment in a particular rural service area can appropriately support the entry of one or more competitive carriers.¹⁴ Although the Joint Board was unable to reach a consensus to recommend specific per-line support benchmarks, it did recognize the value of per-line support benchmarks and encouraged the Commission to solicit comment on whether such benchmarks should be adopted.¹⁵ This issue could be of particular significance in areas in which multiple competitors have sought CETC designation. If the Commission ultimately concludes

¹³ *Id.*, Dissenting Statement of Commissioner Kevin J. Martin at 2.

¹⁴ Recommended Decision ¶ 43. The Joint Board concluded that "[i]f the per-line support level is high enough, the state may be justified in limiting the number of ETCs in that study area, because funding multiple ETCs in such areas could impose strains on the universal service fund. Moreover, if the Commission were to cap per-line support upon entry of a competitive ETC and impose a primary-connection restriction, as discussed [in the Recommended Decision], designating an excessive number of ETCs could dilute the amount of support available to each ETC to the point that each carrier's ability to provide universal service might be jeopardized." *Id.*

¹⁵ *Id.*

that per-line support benchmarks should be applied to limit the number of CETCs designated in certain high-cost areas, but a greater number of CETCs already have been designated in the interim, the affected markets already will have suffered the harm justifying the establishment of per-line benchmarks. Once the Commission decided to establish per-line benchmarks, these markets would either continue to suffer that harm (because of grandfathering existing CETCs) or would experience market disruption as the Commission rescinded one or more CETC designations. The better policy approach would be to resolve the per-line benchmark issue before granting additional petitions for CETC designation that later could be found to undermine the public interest.

Third, by considering petitions for ETC designation under the interim *Virginia Cellular* public interest framework *after* release of the Recommended Decision proposing *different* guidelines for evaluating whether designation of an ETC will serve the public interest, the Commission creates an incentive for carriers that can satisfy the *Virginia Cellular* standard but may not be able to meet the guidelines proposed in the Recommended Decision to apply for CETC designation as quickly as possible in the hopes of retaining ETC status even if the Commission ultimately adopts public interest guidelines they do not meet. The Recommended Decision raises the question of how the proposed public interest guidelines should be applied to ETCs that already have been designated. The Joint Board recommends that the Commission clarify the scope of authority of states and the Commission to rescind an ETC designation that no longer serves the public interest, but also asks “whether ETC designation for competitive carriers could be grandfathered for some period of time to avoid significant market disruptions.”¹⁶ This issue will be a much more significant problem if the Commission continues to grant petitions for

¹⁶ *Id.* ¶ 45.

ETC designation now than if it suspends the pending petitions and focuses on adopting appropriate guidelines in the rulemaking proceeding.

Finally, dedicating Commission resources to evaluating the numerous pending petitions for ETC designation will slow consideration of the issues in the rulemaking proceeding. As described above, the rulemaking proceeding is the preferred vehicle for addressing the important policy issues implicated in the pending petitions for ETC designation. Delaying the rulemaking proceeding to decide the pending petitions will only exacerbate the problems and concerns the proceeding is intended to resolve. The longer these problems linger, the more the universal service system risks becoming inconsistent with its underlying statutory mandate.¹⁷

For the foregoing reasons, TDS Telecom urges the Bureau and the Commission to suspend consideration of pending petitions for ETC designation, including the AWS Petition, until after the significant policy issues raised in the pending Recommended Decision and Notice have been resolved. Continuing on the present course will only increase the complexity and difficulty of resolving these issues and – particularly if ETC designations are grandfathered – could undermine the ability of the measures ultimately adopted to achieve their intended goal of improving the long-term sustainability of the universal service fund.

II. THE PETITION FAILS TO SATISFY THE *VIRGINIA CELLULAR* INTERIM PUBLIC INTEREST STANDARD

If the Commission decides to address the AWS Petition on its merits, it should find that the proposed ETC designation is not consistent with the public interest as defined in *Virginia Cellular*. According to *Virginia Cellular*, “[i]n determining whether designation of a competitive ETC in a rural telephone company’s service area is in the public interest, [the

¹⁷ *Id.* ¶ 11 (noting that guidelines encouraging a rigorous ETC application process are consistent with the requirements of Section 214(e)(2) and Section 254(b)(3) of the Communications Act).

Commission] weigh[s] the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame."¹⁸ In applying this balancing test in both *Virginia Cellular* and *Highland Cellular*, the Commission credited such factors as (1) efforts to provide wireless service to residences not served by the wireline network, (2) mobility of service, (3) commitments to use universal service funds to improve service quality to unserved areas, (4) adoption of the CTIA Consumer Code for Wireless Service, (5) commitment to submit consumer complaint information to the Commission, (6) lack of significant overall impact on the universal service fund, and (7) absence of rural creamskimming concerns.

Although the AWS Petition attempts to meet the *Virginia Cellular* standard, it falls short in a number of important respects. First, AWS does not commit to expand and improve its network to provide service to residences that are not currently served by the wireline network. In this respect, the *additional* benefits of designating AWS as an ETC are not as significant as those involved in *Virginia Cellular*. Second, AWS does not provide construction plans or otherwise commit to use universal service funds to improve service to *rural* areas. Contending that it already provides "nearly ubiquitous" service in Florida,¹⁹ AWS states only that it will use high-cost support "to improve its network facilities and infrastructure," making capital expenditures in Florida that will exceed the amount it could receive in universal service support.²⁰ However, because AWS provides no details concerning the types of capital

¹⁸ *Virginia Cellular* ¶ 28.

¹⁹ Petition at 22.

²⁰ Petition at 20.

expenditures it has planned, it is entirely possible that the bulk of these expenditures could be dedicated to expanding AWS's network capacity and reliability in relatively more densely-populated areas. In this respect, the Petition does not show clearly that there is no risk of rural creamskimming in AWS's request for CETC designation.

Finally, the overall impact on the universal service fund if AWS's petition is granted is materially greater than the impact in *Virginia Cellular*. In *Virginia Cellular*, the *maximum* quarterly support Virginia Cellular could receive in the designated service areas, if it captured each and every customer in the proposed service areas, was just under \$900,000. The Petition states that the *actual* high-cost support AWS expects to receive if granted ETC status is \$3.3 million per quarter, or \$13.2 million annually.²¹ This figure is over 3 times the amount at stake in *Virginia Cellular*, and is not an insignificant amount.²² The "overall impact" of the designation of AWS in the Quincy service area is also potentially more significant than in *Virginia Cellular*. Here, the Quincy service area is also subject to a petition for ETC designation by Nextel Partners.²³ As discussed above, many rural markets may not have the economies of scale necessary to sustain competition. The potential harm to the ability of the incumbent carrier to provide universal service throughout its service area becomes greater as the number of CETCs grows.²⁴ The Commission cannot determine that the designation of multiple CETCs in the

²¹ Petition at 19.

²² AWS has also sought ETC designation in Alabama, where it anticipates being eligible for another \$240,000 per quarter (\$960,000 annually). See Supplement, *Federal-State Joint Board on Universal Service, Petition of AT&T Wireless Services, Inc. for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, FCC 97-419*, CC Docket No. 96-45, at 5 (May 11, 2004). Over time, designation of AWS across its coverage area could result in an even greater draw on the Universal Service Fund.

²³ See Petition, *Federal-State Joint Board on Universal Service, NPCR, Inc. d/b/a Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida*, CC Docket No. 96-45 (filed Sept. 16, 2003, Supplement filed Mar. 24, 2004).

²⁴ The Petition contends that the incumbent carrier's provision of universal service will not be harmed by the designation of AWS as a CETC because "[u]nder the current funding mechanisms, rural telephone companies will continue to receive funding based on an embedded cost methodology until 2006, and will not lose support if they

(continued...)

Quincy service area serves the public interest until it has evaluated the viability of per-line support benchmarks and can determine whether the per-line costs in the Quincy area support designation of at least two ETCs in addition to Quincy.

In sum, the Petition fails to show, to the extent required by *Virginia Cellular*, that the designation of AWS as an ETC will provide sufficient *additional* benefits in the *rural* service areas in which AWS seeks ETC designation to outweigh the burden of the proposed ETC designation on the universal service fund and on the ability of the incumbent wireline carrier to provide universal service throughout its service area.

CONCLUSION

The problems and concerns identified in the pending Recommended Decision and Notice concerning the ETC designation process should be resolved in the rulemaking proceeding before the Commission grants any additional petitions for ETC status. Otherwise, the problems will be exacerbated and the Commission's efforts to address the issues will be undermined. Accordingly, the Commission should defer consideration of the Petition until after it takes action in the rulemaking proceeding. Alternatively, the Commission should reject the Petition as inconsistent with the public interest framework set forth in *Virginia Cellular*. AWS has not

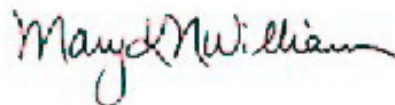
(continued...)

lose lines to AWS as a competitor." Petition at 24. This argument ignores the proposals in the Recommended Decision and Notice to cap per-line support and potentially limit support to a single connection per subscriber. Recommended Decision ¶¶ 62-87; Notice ¶ 3. Any balancing of benefits and harms from ETC designation must consider the potential harm to the incumbent's provision of universal service to the public that could result from the loss of support to competitors under the proposed scenario. Of course, analysis of this harm would be much more concrete if the Commission deferred consideration of pending ETC petitions until it has made a decision concerning whether or not to adopt the proposed modifications to the scope of support provided to incumbent LECs.

shown that the requested ETC designation will bring sufficient additional benefits to the proposed rural service areas to outweigh the costs to the universal service system.

Respectfully submitted,

TDS TELECOMMUNICATIONS CORP.

A handwritten signature in blue ink, reading "Mary Newcomer Williams". The signature is written in a cursive style with a large initial "M".

By: Gerard J. Waldron
Mary Newcomer Williams
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
Tel.: (202) 662-6000
Fax: (202) 662-6291

Attorneys for TDS Telecom

June 21, 2004